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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-2987

ERIC R. WELSH, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

GREENBERG, *Judge*: The appellant, Eric R. Welsh, appeals through counsel a June 18, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to (1) a disability rating in excess of 10% for his right tibia; (2) a compensable rating for his left tibia; (3) a disability rating in excess of 10% for his right foot; and (4) a disability rating in excess of 10% of his left foot. Record (R). at 2-16. The appellant argues that the Board erred by failing to (1) ensure that the duty to assist was satisfied and (2) provide an adequate statement of reasons or bases for its findings regarding his left tibia, right tibia, left foot, and right foot. Appellant's Brief at 1-13. For the following reasons, the Court will vacate the Board's June 2015 decision and remand all matters for readjudication.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and specified relations of veterans, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined

pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); *see Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant served on active duty in the U.S. Army from January 1994 to April 1996, as a patriot missile crew member. R. at 56 (DD Form 214). During his service, the appellant developed shin splints, which developed into a left tibial stress fracture and bilateral stress fractures. R. at 215. In addition, the appellant injured his right leg and right ankle after confronting his commanding officer. R. at 215.

In December 1996, the appellant was awarded service connection for his right tibia, left tibia, right foot, and left foot and given a noncompensable rating for each of these disabilities. R. at 365-68. In November 2010 the appellant requested increased ratings for his service-connected disabilities. R. at 318. In January 2011 he underwent a VA examination where the examiner noted a decreased range of motion (ROM) in the right ankle. R. at 281-90. The appellant was subsequently awarded a 10% disability rating for his right tibia, but was denied compensable ratings for any of his other service-connected disabilities. R. at 240-44.

A January 2014 examiner noted that the appellant had stress fractures of the second and third metatarsals bilaterally with moderate residual pain. R. at 208, 210. The examiner also noted that between the right tibia and right fibula a "small accessory ossicle or very small ununited fracture of the tip of medial malleolus" was present. R. at 222. Finally, the examiner noted that the appellant suffered an additional 5 degrees of ROM loss to his right ankle during flare-ups of his right tibia pain. R. at 200. In January 2015, the appellant was awarded a separate 10% disability rating for each foot. R. 28-32.

In January 2015 the Board issued a decision finding against an increase in rating for any of the appellant's service-connected disabilities. R. at 2-16. This appeal ensued.

The Court concludes that the Board erred in relying on an incomplete January 2014 VA examination because the examiner failed to test the ROM of the appellant's ankle during weight-bearing positions. *See* 38 C.F.R. § 4.59 (2016). The Court recently held that § 4.59 required ROM testing of joints in both weight-bearing and non-weight-bearing positions. Remand is required for

the Board to obtain an addendum of the January 2014 VA examination.

In addition, the Court concludes that the Board failed to provide an adequate statement of reasons or bases on the impact of the ununited fracture present between the appellant's right tibia and right fibula. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (the Board is required to provide a written statement of the reasons or bases for its findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court). In its April 2015 decision, the Board acknowledged that the appellant's January 2014 examiner found a small ununited fracture between his right tibia and right fibula.¹ The Board failed to consider whether this ununited fracture, along with the overall severity of the appellant's tibia and fibula condition, entitled him to a higher rating under diagnostic code (DC) 5262. *See* 38 C.F.R. § 4.71 (2016) (stating that a nonunion of the tibia and fibula requires a 40% rating and that malunion of the tibia and fibula requires a 30% rating). Remand is required for the Board to provide an adequate statement of reasons or bases on the impact of the appellant's ununited fracture between the right tibia and right fibula.

The Court also agrees with the Secretary's concession that the Board provided an inadequate statement of reasons or bases for denying entitlement to a higher rating for the appellant's right tibia disability due to the Board's error in not considering the appellant's additional ROM loss due to flare ups. *See Gilbert v. Derwinski*, 1 Vet.App. at 56-57. The January 2014 VA examination¹ noted that the appellant suffered an additional 5 degrees of loss of ROM on flare-ups. However, the Board failed to address this favorable evidence. Remand is required for the Board to adequately determine the impact of the favorable evidence of additional ROM loss due to flare-ups; and if on remand the Board is unsure of what the impact of this favorable evidence is on the appellant's increased rating claim, the Board must then order a new VA examination.

Because the Court is remanding the appellant's claim, it will not address his remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998) (remand of the appellant's claim under one theory moots the remaining theories advanced on appeal). On remand, the appellant may

¹The Court notes that it has not deemed the January 2014 examination inadequate as to the information it does contain, merely that it is missing information. *See Monzingo v. Shinseki*, 26 Vet. App. 97, 107 (2012) (noting that although a medical examination may be deemed inadequate in part, the parts that are adequate cannot be completely ignored and still hold probative value).

present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The remanded matter is to be provided expeditious treatment. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. at 410 n. ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one" (internal quotation marks omitted)).

For the foregoing reasons, and on review of the record, the June 18, 2015, Board decision is VACATED, and the matters are REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

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